Comments on December 11, 2001 Interim Final Rule
September 11th Victim Compensation Fund of 2001
28 CFR Part 104

Background and Format

The commenter is a retired former divisional general counsel for a Delaware corporation, and a member of the NYS Bar. The commenter has volunteered to provide pro bono assistance, but does not currently represent any particular 9-11 victim.

Simply opening this email does not reveal the charts – each of which is worth 1,000 words. The attached document in Microsoft Word® has identical text, but does show the charts. If, for any reason, the charts in the Word document cannot be seen or printed, open the second attachment, an Excel® workbook with four worksheets. It would be preferable to place the document and workbook – not this email – in the electronic public record. If this cannot be done, please invite any interested person to contact me directly.

Page references are to the Interim Final Rule as published on the DOJ website.

Address information is provided at the foot of this document.

Summary of Comments

All three comments relate to problems and errors in the calculation of Presumed Economic Loss, and are set forth in descending order of the likely magnitude of harm to many claimants. Without access to the actual formulae used to prepare the Presumed Loss Tables, it is difficult to pinpoint the reason for any of the problems. The opening suggestion is to fully publish these formulae. There is no reason not to make the method completely transparent, like that in Sheet 4 of the workbook. This would equip claimants and their representatives with a precise method to determine Presumed Losses.

The three problems or errors that are apparent in studying a representative sample of two of the Tables and the accompanying material are:

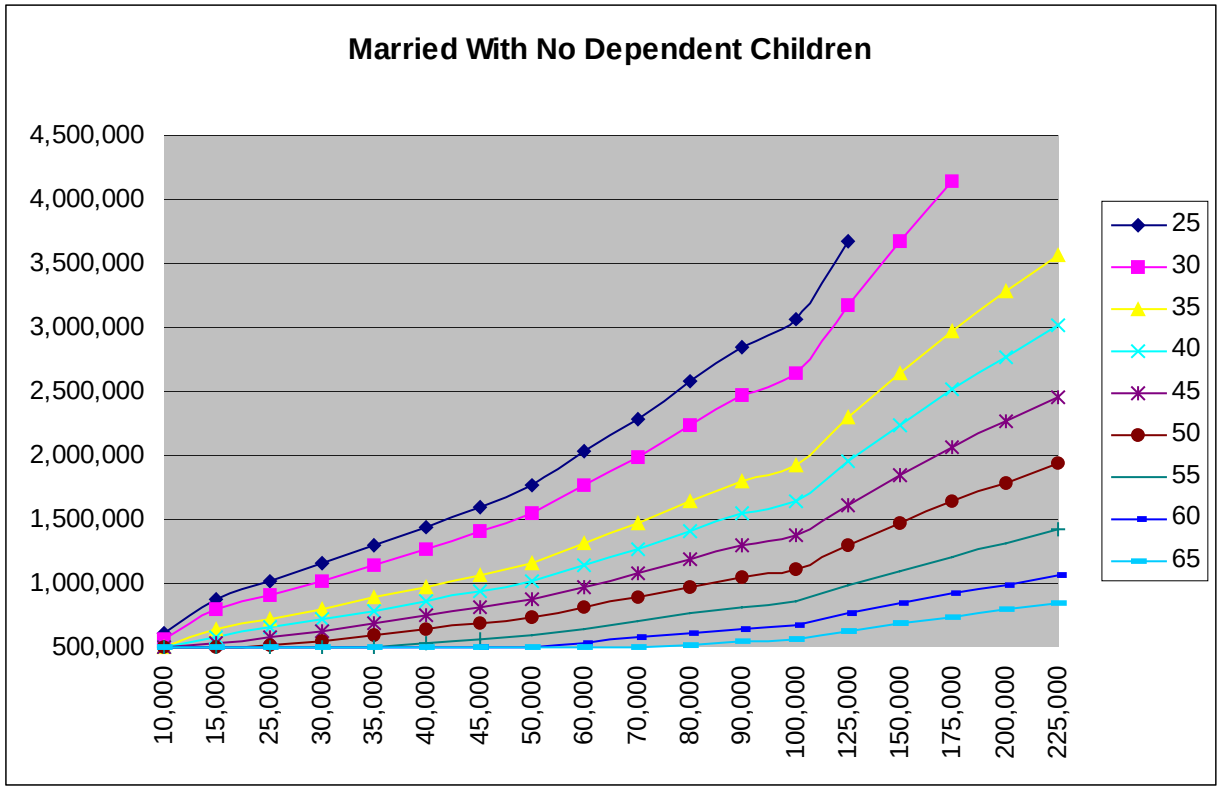
1. The broad, flat age brackets for the promotion/merit assumptions are inequitable and are terribly unfair to the survivors of those who were in their early 30's, and to a lesser extent to survivors of those who were in their early 50's. This is contrary to the stated intent of the rules to "treat similarly situated claimants alike." (p. 4)
2. The increases in Estimated Losses are greater within the $10-15,000 income bracket than it is within either the $15-25,000 bracket, or within the $25-30,000 income bracket. If not addressed, this could be detrimental to survivors of relatively low-income victims.
3. The inflation factor is not stated, but appears to be slightly lower for older workers.

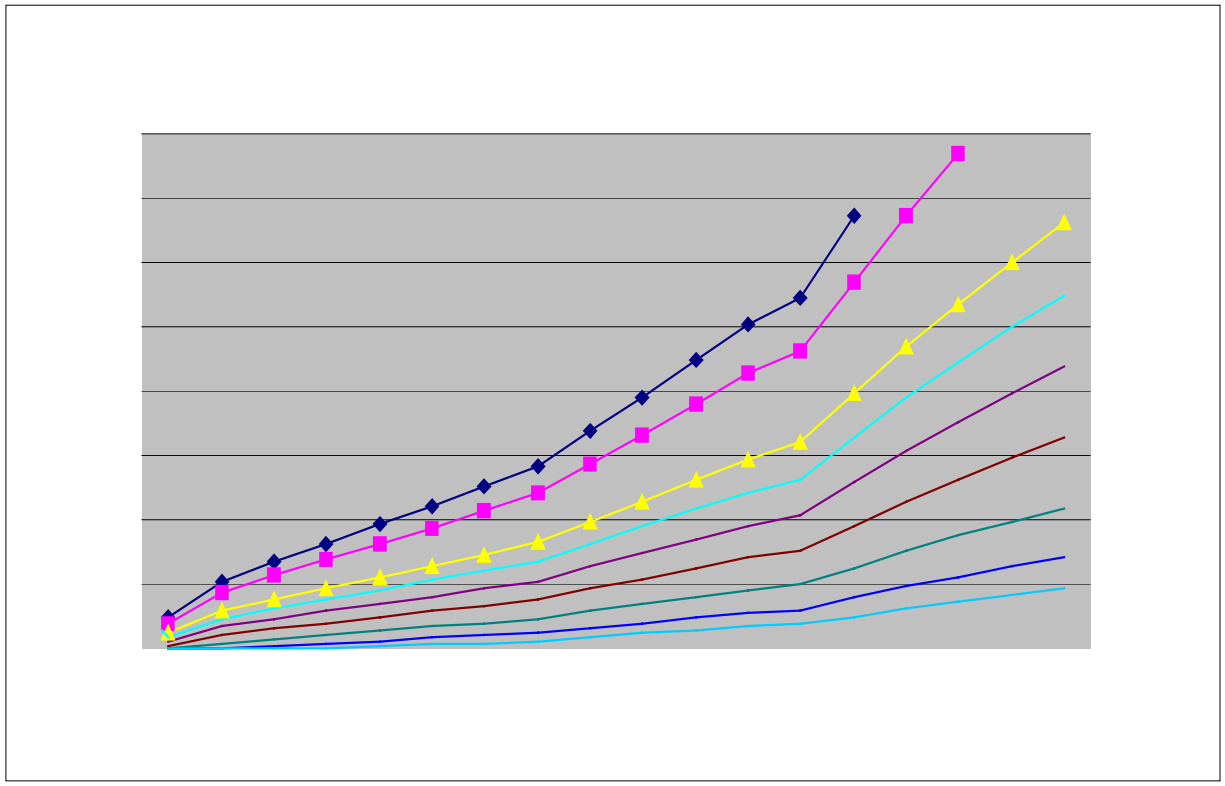
(1) Broad Age Brackets

The broad age brackets for the promotion/merit assumptions are inequitable and are terribly unfair to 31-40 year olds, and to a lesser extent to 51-57 year olds. The rules state that "each claimant should, to the greatest extent possible, be treated fairly … relative to other claimants." "In principle, similarly situated claimants should not receive

dramatically differing treatment." (p. 9) Yet the choice of very large brackets for assumed income increases does exactly that. The below two representative charts both show a dramatic difference between the calculations for 30- and 35-year old victims.

(Sheets 1 & 2)





The explanation for the Presumed Economic and Non-Economic Loss Tables states the assumptions for calculating lost future income from decedents.

> "(I)ndividuals in the age range up to 30 would have received wage increases of 6.6 percent per year; those between 31 and 50 would have received a wage increase of 5.1 percent per year; and those above 50 would have received a wage increase of 4.2 percent per year. These figures are based on two factors: wage increases due to general inflation and wage increase due to promotion/merit. The wage increases incorporate an assumed salary increase of .5 percent over inflation and a merit and promotion increase for young, middle- and older-age workers of 3 percent, 1.5 percent, and .7 percent respectively. Both of these wage increase assumptions are based on an analysis of data from independent Boards of Actuaries of the two largest pension systems: the Board of Actuaries of the Civil Service Retirement System and the Board of Actuaries of the Military Retirement System."

The problem with this broad-bracket approach, and the reason for the dramatic differences, is the precipitous decline from assumed level annual 6.6% increases through age 30 to assumed level annual increases thereafter of 5.1%. There is also a decline after age 50 when the assumed level annual increases drop to 4.2%. The latter is not as visible on the above charts since it does not have as many years to work its inequities, but it is there nonetheless.

Using a sliding scale of percentage annual increases that changes at least once each year would have been the best way to prevent these inequities.

(Sheet 3)

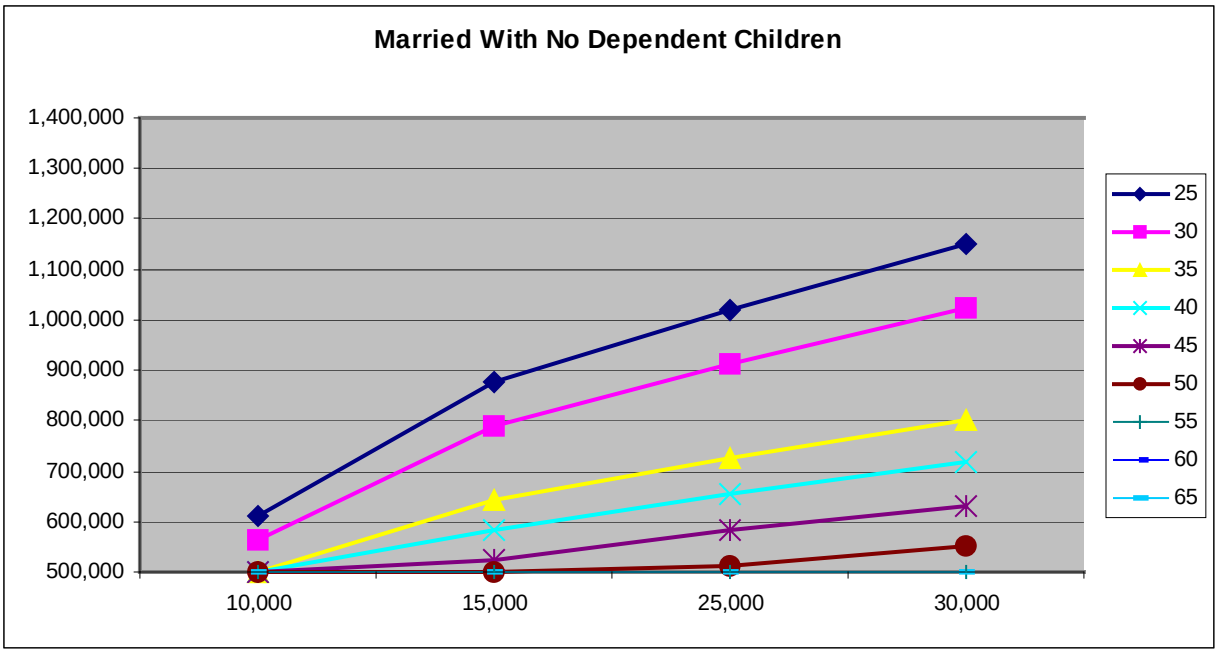
Of course, changing it now will decrease the assumed amounts somewhat for workers in the older side of each of the three age brackets. Some of their survivors may already have relied on the published tables and given up their lawsuit alternative in order to obtain the $50,000 Advance Benefit. (p. 8) Under the circumstances, the most equitable correction would be to freeze the assumed annual increase at 6.6% per year for all ages. While it may be a statistical fact that average annual increases are inversely related with age, there is no consensus that this is right or, indeed, that it is always lawful.

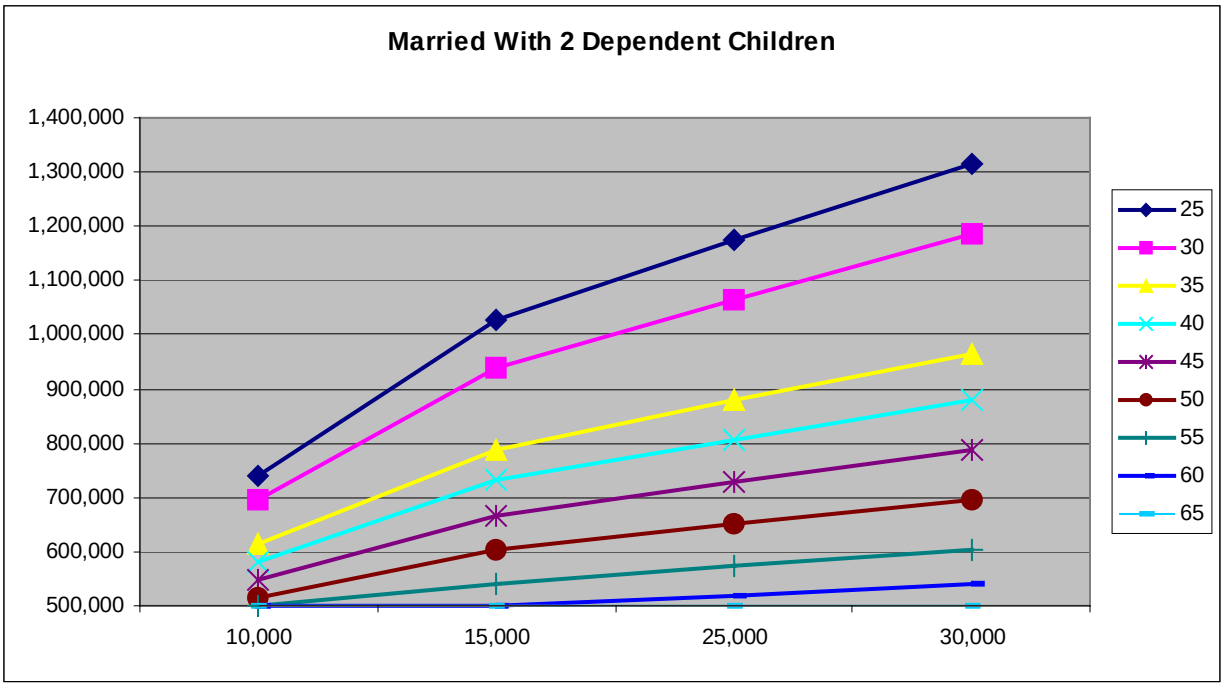
The impact of these broad brackets is not trivial. One can estimate the difference that a continuous sliding scale would make. It should increase the Presumed Losses of 35-year old workers by about one-quarter of the difference between them and the Presumed Losses of 30-year old workers. This increase represents nearly two years' income and about 10% of the Presumed Economic Losses for the survivors of these people who had the misfortune of perishing in the wrong age bracket. At the $25,000 income level it would raise the award about $47,000, at $50,000 it would rise by $95,000 and at $100,000 it would rise by $179,000. (See Sheet 4.)

(2) Low Income Bracket Increase Question

The increases in Estimated Losses are greater within the $10-15,000 income bracket than they are within either the $15-25,000 bracket, or the $25-30,000 income bracket. A possible symptom of the problem is the lack of a column in the Tables for a $20,000 income level even though there is a column for every other $5,000 of income between $10,000 and $50,000. In any case, the increases within the "double" $15-25,000 bracket should be greater than the increases within any of the $5,000 brackets. See the below tables. If not addressed, this could be detrimental to many survivors of relatively low-income victims.

(Sheets 1 & 2)





(3) Inflation Factor for Older Workers

The explanation for the Presumed Economic and Non-Economic Loss Tables states the assumptions for calculating lost future income from decedents:

> "(I)ndividuals in the age range up to 30 would have received wage increases of 6.6 percent per year; those between 31 and 50 would have received a wage increase of 5.1 percent per year; and those above 50 would have received a wage increase of 4.2 percent per year. These figures are based on two factors: wage increases due to general inflation and wage increase due to promotion/merit. The

wage increases incorporate an assumed salary increase of .5 percent over inflation and a merit and promotion increase for young, middle- and older-age workers of 3 percent, 1.5 percent, and .7 percent respectively."

The inflation factor is not stated, but can be derived by simple formula: (a) assumed total increase, minus (b) assumed merit/promotion increase, minus (c) 0.5 percent. The calculations show that the inflation factor for older workers is less than it is for the others.

- Young workers: 6.6% - 3.0% - 0.5% = 3.1%.
- Middle-age workers: 5.1% - 1.5% - 0.5% = 3.1%.
- Older-age workers: 4.2% - 0.7% - 0.5% = 3.0%.

It is difficult to see how the decrease for older-workers could be due to rounding, but without the formulae one cannot be certain. It is possible that there is simply a typo in the explanation. This should be checked thoroughly lest the survivors of older workers be adversely impacted.

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Date: January 11, 2002